BORNEO HOUSING MORTGAGE FINANCE BERHAD

v.

TIME ENGINEERING BERHAD (FORMERLY KNOWN AS TIME ENGINEERING SDN. BHD.)

FEDERAL COURT, KOTA KINABALU
TAN SRI DATO' MOHD EUSOFF CHIN CJ
TAN SRI DATO' EDGAR JOSEPH JR. FCJ
DATUK WIRA WAN YAHYA PAWAN TEH FCJ
[CIVIL APPEAL NO. 02-423 OF 1994]
11 APRIL 1996

LAND LAW: *Indefeasibility of title and interests - Torrens system - System of land tenure in Sabah - Whether an absolute Torrens system or a modified Torrens system of land registration - Sabah Land Ordinance (Cap 68) - Comparison with position in Peninsular Malaysia and Sarawak.*

LAND LAW: *Indefeasibility of title and interests - Effect of registration - Position in Sabah - Implications of s. 88 of Sabah Land Ordinance (Cap 68) - Beneficial ownership - Priorities.*

LAND LAW: *Sale of land - Sale and purchase agreement between developer and purchaser - Land charged to chargee by developer to secure loan - Charge registered - Purchaser paid entire purchase price - Developer defaulted - Order for sale - Property sold to third party - Whether developer a trustee for purchaser at time when charge was created - Concept of bare trust - Whether purchaser or chargee has priority.*

EQUITY & TRUST: *Contract for sale of land - Concept of bare trust - When does bare trust arise - Contractual events under which bare trust arises - Full purchase price - Duly executed, valid, and registrable transfer of land in due form - Applicability in Sabah's system of land tenure.*

EQUITY & TRUST: *Contract for sale of land - Concept of bare trust - Whether bare trusts can take effect retrospectively - Whether bare trusts operate retrospectively by conversion to date of sale and purchase agreement - Difficulties of application in a Torrens system of land registration.*

CONTRACT: *Sale and purchase of land - Agreement for sale of land and building erected thereon - Whether vendor becomes a bare trustee for purchaser - When does vendor become a trustee - Beneficial ownership versus registered title.*

CONTRACT: *Specific performance - Sale and purchase of land - Original purchaser issued originating summons after purchaser at judicial sale obtained certificate of sale - Whether specific performance available - Whether trustee/beneficiary relationship applicable.*

This was an appeal from the decision of the High Court arising out of a priority dispute concerning certain immovable properties. The contest was between a chargee (the appellant) under a charge registered pursuant to s. 104 of the Sabah Land Ordinance (Cap 68) (the Ordinance), and a purchaser (the respondent) under a sale and purchase agreement (S&P agreement) in respect of one unit of proposed industrial building (the building) to be built on one of the four pieces of land (the land) the subject matter of the charge.

On 1 March 1982, the chargor, a developer, applied for a bridging loan (the loan) from the appellant, a finance company, to finance its proposed industrial development project on the land. On 2 November 1982, the chargor entered into a S&P agreement with the respondent for the sale of the building to the latter. On 28 May 1983, the chargor created a charge (duly registered under s. 104 of the Ordinance on 21 June 1983) over the land in favour of the appellant as security for the repayment of the loan. By 23 May 1986, the respondent had effected due payment of the entire purchase price of the building in favour of the chargor. However, the chargor defaulted in its repayment of the loan, and, upon the application of the appellant, an order for sale in respect of the land was made by the Assistant Collector of Land Revenue, Kota Kinabalu (the Collector) on 17 August 1991. The land was subsequently sold to a third party (the third party purchaser) on 30 November 1991, and a certificate of sale was issued on 26 February 1992.

On 7 December 1991, the respondent commenced proceedings against the chargor, the appellant, the Collector, and the third party purchaser, and obtained the following relief from the High Court: (1) a declaration that the chargor was a bare trustee for the respondent in respect of the land and the building erected thereon with effect as from 2 November 1982 by virtue of the S&P agreement; (2) a declaration that the appellant's charge over the land was null and void or invalid on the ground that the chargor no longer had any chargeable interest in or over the land to create a valid charge in favour of the appellant; (3) alternatively, a declaration that the appellant's charge was subject to the respondent's prior equitable interest over the land which was acquired by way of the S&P agreement which preceded the execution and registration of the appellant's charge; (4) a declaration that any foreclosure action taken by the appellant which resulted in a sale of the land was subject to the respondent's prior equitable interest by payment to the respondent the purchase price which the respondent had paid to the chargor; and (5) costs.

Relying on the dicta of H.S. Ong FJ in *Temenggong Securities Ltd. & Anor. v. Registrar of Titles, Johore & Ors.* and, certain passages in Sinnadurai's

Sale and Purchase of Real Property in Malaysia, the trial Judge held that the chargor had, upon receipt of the full purchase price from the respondent, become a bare trustee for the respondent, and that this trusteeship operated retrospectively by conversion to the date when the S&P agreement was made. This meant that the chargor became a trustee on 2 November 1982, and was, thus, already holding the land in trust for the respondent when it created the charge in favour of the appellant on 28 May 1983.

The appellant appealed.

Held:

Per Edgar Joseph Jr. FCJ (delivering the judgment of the Court):

[1] The system of land tenure in Sabah is not an absolute Torrens system but a modified Torrens system of land registration. Unlike the position in Peninsular Malaysia and Sarawak, where there are express provisions conferring indefeasibility of title and interests (ss. 92(1) and 340 of the National Land Code 1965, and s. 131 of the Sarawak Land Code (Cap 81), respectively), there is no provision in the Ordinance conferring indefeasibility of title to or interests in land which is a feature of central importance to the Torrens system of land registration.

[2] However, s. 88 of the Ordinance which emphasises the paramount importance of registration as a condition precedent for the recognition of the validity of any new title to or dealing with or claim to or interest in any land, does imply the basic Torrens concept that title to or interest in land vests and divests only upon registration.

[3] The Peninsular Malaysia cases, with their emphasis on the indefeasibility of the chargee's registered title guaranteed under s. 340 of the National Land Code 1965, have no direct relevance to the issues which arose for decision in the present appeal.

[4] The correct approach to adopt in considering the priority dispute in this appeal was to apply the general law priority rules, not forgetting s. 88 of the Ordinance, and the concept of bare trust in a vendor/purchaser situation.

[5] There has been a consistent current of recent decisions by the Supreme Court applying the concept of bare trust in a vendor/purchaser situation. Thus, it is too late now to question the applicability of this concept. However, the concept, as enunciated in *Lysaght v. Edwards*, would have to be applied in a modified form, at least in so far as the question of when a bare trust arises in concerned.

[6] The contractual events, which result in a vendor becoming a trustee of the land for the purchaser, only came to completion upon receipt by the

vendor of the full purchase price, paid timely, and when the vendor has given the purchaser a duly executed, valid, and registrable transfer of the land in due form.

[7] Therefore, the proposition of law as advanced in the recent judgment of the High Court in *Ahmad Salleh & Ors. v. Rawang Hills Resort Sdn. Bhd*. ie, "that after a sale and purchase agreement for the sale of land is concluded, the purchaser, under our Malaysian law, derives a beneficial ownership to the said land," has to be overruled. To apply, as did the High Court, the dicta of Jessel MR in *Lysaght v. Edwards* in unqualified terms to a Torrens system or a modified Torrens system of land tenure would be misplaced.

[8] Furthermore, the proposition that a bare trusteeship operates retrospectively by conversion to the date when the sale and purchase agreement was made, if applied universally, could cause considerable difficulties in a Torrens system or even a modified Torrens system of land registration.

[9] The trial Judge had erred in law in holding that the appellant's charge was created after the chargor had become a bare trustee for the respondent retrospectively. On 28 May 1983 when the charge was created, and on 21 June 1983 when the charge was duly registered, the chargor was not yet a bare trustee for the respondent in connection with the S&P agreement. Therefore, the priority dispute between the appellant and the respondent had to be resolved in favour of the appellant.

[10] The third party purchaser had obtained a certificate of sale well before the respondent issued its originating summons, and in such circumstances, no Court would grant specific performance of the S&P agreement as between the respondent and the chargor. It is settled law that a trustee/beneficiary relationship will not be applied in a vendor/purchaser situation where the contract of sale and purchase is not one of which a Court would grant specific performance.

Per curiam:

[1] Even on the assumption that the appellant's charge was created and registered after the completion of the S&P agreement, *viz,* after the payment of the full purchase price and the delivery of a duly executed, valid, and registrable transfer, it would still have been clearly wrong to decide the priority dispute in favour of the respondent. This was because s. 88 of the Ordinance implies the basic Torrens concept that title to or interest in land vests and divests only upon registration.

[2] The following proposition of law would apply to Sabah in relation to a charge of land registered under the Ordinance: the doctrine of constructive notice is inapplicable to systems of registration in relation to transactions

where priority and notice are governed by priority in or the fact of registration, and the Court will not readily apply the doctrine where the effect would be to invalidate a transaction in relation to the sale of land.

[3] Section 12 of the Housing (Control and Licensing) Enactment 1978 provides that every contract of sale shall contain a provision binding on the developer that immediately after a contract of sale has been signed, the developer shall not subject the land sold to the purchaser to any encumbrance without the prior approval of the purchaser. In the present appeal, s. 12 of the Enactment would have been relevant as the S&P agreement was executed before the charge was created. However, the S&P agreement did not include the mandatory provisions of s. 12 of the Enactment.

[4] In law, there is no requirement that prior to the creation of a charge over land which is intended for development and sub-division into lots, a chargee is under an obligation to ascertain that the lots have not been sold or that they are not the subject of sale and purchase agreements executed by the chargor as vendor. Such an omission would not constitute a fraud under s. 340(2)(a) of the National Land Code 1965.

[Appeal allowed]

***[Bahasa Malaysia** Translation of Headnotes]*

***UNDANG-UNDANG TANAH:** Hakmilik dan kepentingan tak boleh sangkal - Sistem Torrens - Sistem pemegangan tanah di Sabah - Samada merupakan suatu sistem Torrens yang mutlak atau sistem Torrens bagi pendaftaran tanah yang telah diubahsuaikan - Ordinan Tanah Sabah (Cap. 68) - Perbandingan dengan keadaan di Semenanjung Malaysia & Sarawak.*

***UNDANG-UNDANG TANAH:** Hakmilik dan kepentingan tak boleh sangkal - Kesan Pendaftaran - Kedudukan di Sabah - Implikasi-implikasi s. 88 Ordinan Tanah Sabah (Cap. 68) - Pemilikan benefisial - Keutamaan-keutamaan.*

***UNDANG-UNDANG TANAH:** Penjualan tanah - Perjanjian jualbeli antara pemaju dan pembeli - Tanah digadaikan kepada pemegang gadaian oleh pemaju bagi menjamin pinjaman - Gadaian didaftarkan - Pembeli telah membayar keseluruhan harga belian - Pemaju telah mungkir - Perintah untuk jualan - Hartanah dijual kepada pihak ketiga - Samada pemaju merupakan pemegang amanah bagi pembeli ketika gadaian diwujudkan - Konsep bare trust - Samada pembeli atau pemegang gadaian mempunyai keutamaan.*

***EKUITI & AMANAH:** Kontrak bagi penjualan tanah - Konsep bare trust - Bilakah berbangkitnya bare trust - Peristiwa-peristiwa kontraktual di bawah yang mana berbangkitnya bare trust - Harga belian sepenuhnya*

- Pindahmilik tanah yang telah disempurnakan, yang sah dan boleh didaftarkan dalam bentuk yang sempurna - Keterterapan dalam sistem pemegangan tanah Sabah.

EKUITI & AMANAH: *Kontrak bagi penjualan tanah - Konsep bare trust - Samada bare trust boleh memberi kesan secara kebelakangan - Samada bare trust bertindak secara kebelakangan melalui penukaran kepada tarikh perjanjian jualbeli - Kesukaran-kesukaran pemakaian dalam pendaftaran tanah menurut sistem Torrens.*

KONTRAK: *Penjualan dan pembelian tanah - Perjanjian bagi penjualan tanah dan bangunan yang didirikan di atasnya - Samada penjual menjadi bare trustee bagi pembeli - Bilakah penjual menjadi pemegang amanah - Pemilikan benefisial berbanding dengan hakmilik berdaftar.*

KONTRAK: *Pelaksanaan spesifik - Penjualan dan pembelian tanah - Pembeli asal mengeluarkan saman pemula selepas pembeli di penjualan kehakiman mendapatkan perakuan jualan - Samada terdapat pelaksanaan spesifik - Samada perhubungan pemegang amanah/benefisiari terpakai.*

Ini merupakan satu rayuan daripada keputusan Mahkamah Tinggi yang berbangkit daripada satu pertikaian keutamaan berhubung hartanah-hartanah tak boleh alih. Pertikaian tersebut adalah antara pemegang gadaian (perayu) di bawah satu gadaian yang didaftarkan selaras dengan s. 104 Ordinan Tanah Sabah (Cap. 68) (Ordinan tersebut), dan pembeli (responden) di bawah satu perjanjian jualbeli (Perjanjian S&P) berhubung dengan satu yunit bangunan perindustrian yang dicadangkan (bangunan tersebut) yang akan dibina di atas salah satu bidang tanah (tanah tersebut) yang merupakan hal-perkara gadaian tersebut.

Pada 1 Mac 1982, penggadai, yang merupakan pemaju, telah memohon untuk mendapatkan pinjaman penyambungan (pinjaman tersebut) daripada perayu, sebuah syarikat kewangan, bagi membiayai projek pembangunan perindustriannya yang dicadangkan itu di atas tanah tersebut. Pada 2 November 1982, penggadai telah memasuki satu perjanjian S&P dengan responden untuk menjual bangunan tersebut kepada pihak yang terkemudian. Pada 28 May 1983, penggadai telah mewujudkan satu gadaian (yang didaftarkan dibawah s. 104 Ordinan tersebut pada 21 Jun 1983) ke atas tanah tersebut atas nama perayu sebagai jaminan bagi pembayaran balik pinjaman tersebut. Pada 23 Mei 1986 responden telah melaksanakan pembayaran yang kena dibayar bagi keseluruhan harga belian bangunan tersebut atas nama penggadai. Walaubagaimanapun, penggadai telah mungkir dalam pembayaran balik pinjaman tersebut, dan atas permohonan perayu, satu perintah jualan berhubung dengan tanah tersebut telah dibuat oleh Timbalan Pemungut Hasil Tanah, Kota Kinabalu (Pemungut) pada 17 Ogos 1991. Tanah tersebut telah berikutan itu dijual kepada satu pihak ketiga (pembeli pihak ketiga) pada 30 November 1991, dan satu perakuan telah dikeluarkan pada 26 Februari 1992.

Pada 7 Disember 1991, responden telah memulakan prosiding terhadap penggadai, perayu, Pemungut dan pembeli pihak ketiga, dan telah mendapatkan relief yang berikut daripada Mahkamah Tinggi: (1) satu pengisytiharan bahawa penggadai adalah bare trustee bagi pihak responden berhubung dengan tanah dan bangunan yang didirikan di atasnya berkuatkuasa daripada 2 November 1982 menurut perjanjian S&P tersebut; (2) satu pengisytiharan bahawa gadaian perayu ke atas tanah tersebut adalah batal dan tak sah atas alasan bahawa penggadai tidak lagi mempunyai kepentingan yang boleh digadaikan di dalam atau ke atas tanah tersebut bagi mewujudkan suatu gadaian yang sah atas nama perayu; (3) secara alternatifnya, satu pengisytiharan bahawa gadaian perayu tersebut adalah tertakluk kepada kepentingan ekuiti terdahulu responden ke atas tanah yang telah diperolehi melalui perjanjian S&P tersebut yang mana telah mendahului penyempurnaan dan pendaftaran gadaian perayu tersebut; (4) satu pengisytiharan bahawa apa-apa tindakan halang-tebus yang diambil oleh perayu yang mengakibatkan penjualan tanah tersebut adalah tertakluk kepada kepentingan ekuiti terdahulu responden melalui pembayaran kepada responden akan harga belian yang telah pun dibayar oleh responden kepada penggadai; dan (5) kos.

Bergantung pada *dicta* H.S. Ong HMP dalam *Temenggung Securities Ltd. & Anor. v. Registrar of Titles, Johore & Ors.* dan petikan-petikan tertentu dalam *Sale and Purchase of Real Property in Malaysia*, oleh Sinnadurai, Hakim perbicaraan memutuskan bahawa penggadai telah, setelah menerima harga belian yang sepenuhnya daripada responden, menjadi bare trustee bagi responden dan bahawa amanah ini beroperasi secara kebelakangan dengan penukaran kepada tarikh bilamana perjanjian S&P tersebut di buat. Ini bermakna penggadai telah menjadi pemegang amanah pada 2 November 1982, dan telah, dengan itu, memegang tanah tersebut dalam amanah bagi pihak responden bilamana ianya mewujudkan gadaian tersebut atas nama perayu pada 28 Mei 1983.

Perayu telah merayu.

Diputuskan:

Oleh Edgar Joseph Jr. HMP (menyampaikan penghakiman Mahkamah):

[1] Sistem pemegangan tanah di Sabah bukannya merupakan sistem Torrens yang mutlak tetapi adalah merupakan sistem Torrens bagi pendaftaran tanah telah diubahsuaikan. Tidak seperti kedudukan di Semenanjung Malaysia dan Sarawak, di mana terdapatnya peruntukan-peruntukan nyata yang menjadikan hakmilik serta kepentingan tak boleh disangkal (ss. 92(l) dan 340 Kanun Tanah Negara 1965, dan s. 131 Kanun Tanah Sarawak (Cap. 81), masing-masingnya), tidak terdapat peruntukan dalam Ordinan tersebut yang menjadikan hakmilik serta kepentingan tak boleh disangkal dalam tanah yang merupakan ciri utama kepada sistem Torrens bagi pendaftaran tanah.

[2] Walaubagaimanapun, s. 88 Ordinan tersebut yang menekankan pentingnya pendaftaran sebagai satu syarat duluan bagi mengiktirafkan keesahan mana-mana hakmilik baru kepada tanah, atau mana-mana urusan atau kepentingan dalam tanah, ataupun mana-mana tuntutan terhadap tanah, sememangnya menunjukkan konsep asas Torrens bahawa hakmilik atau kepentingan di dalam tanah diletakhak atau tidak diletakhak hanya setelah pendaftaran.

[3] Kes-kes Semenanjung Malaysia, dengan penekanannya kepada hakmilik berdaftar pemegang gadaian yang dijamin di bawah s. 340 Kanun Tanah Negara 1965, tidak mempunyai perkaitan yang terus kepada isu-isu yang berbangkit untuk diputuskan dalam rayuan semasa ini.

[4] Pendekatan yang betul untuk dipakai dalam mempertimbangkan pertikaian utama dalam rayuan ini adalah untuk memakai kaedah-kaedah keutamaan undang-undang awam, dengan tidak melupakan s. 88 Ordinan tersebut, dan konsep bare trust dalam situasi penjual/pembeli.

[5] Terdapat arus keputusan-keputusan semasa yang diputuskan oleh Mahkamah Agung yang memakai konsep bare trust dalam situasi penjual/pembeli. Dengan itu, ianya kini adalah agak lewat untuk mempersoalkan pemakaian konsep ini. Walaubagaimanapun, konsep ini, sepertimana yang disebut dalam *Lysaght v. Edwards*, haruslah dipakai dalam bentuk yang telah diubahsuaikan, sekurang-kurangnya setakat ianya menyentuh persoalan bilakah sesuatu bare trust itu berbangkit.

[6] Peristiwa-peristiwa kontraktual, yang mengakibatkan penjual menjadi pemegang amanah tanah bagi pembeli tersebut, hanya boleh diselesaikan, setelah penjual menerima harga belian yang sepenuhnya, yang dibayar tepat pada masanya, dan bilamana penjual telah memberikan pembeli hakmilik tanah yang telah disempurnakan, yang sah dan boleh didaftarkan.

[7] Dengan yang demikian, proposisi undang-undang sepertimana yang dikemukakan dalam penghakiman Mahkamah Tinggi baru-baru ini dalam *Ahmad Salleh & Ors. v. Rawang Hills Resort Sdn. Bhd.* iaitu "bahawa selepas perjanjian jualbeli bagi penjualan tanah diselesaikan, pembeli, di bawah undang-undang Malaysia, memperolehi keempunyaan benefisial kepada tanah tersebut" haruslah ditolak. Untuk dipakai, sepertimana yang dilakukan oleh Mahkamah Tinggi, *dikta* Jessel MR dalam *Lysaght v. Edwards* dalam terma-terma yang tidak layak kepada sistem Torrens atau sistem Torrens yang diubahsuaikan bagi pemegangan tanah adalah tidak tepat.

[8] Seterusnya proposisi bahawa "bare trusteeship" beroperasi secara kebelakangan melalui pengubahan kepada tarikh bilamana perjanjian jualbeli tersebut dibuat, jika dipakai secara universal, boleh menyebabkan kesukaran

yang teramat sangat dalam sesuatu sistem Torrens atau mahu pun dalam sistem Torrens bagi pendaftaran tanah yang telah diubahsuaikan.

[9] Hakim perbicaraan telah tersalah pertimbangan di sisi undang-undang dalam memutuskan bahawa gadaian perayu telah diwujudkan selepas penggadai menjadi bare trustee bagi pihak responden secara kebelakangan. Pada 28 Mei 1983 apabila gadaian tersebut diwujudkan, dan pada 21 Jun 1983 bilamana gadaian tersebut didaftarkan, penggadai belum lagi menjadi bare trustee bagi responden sehubungan dengan perjanjian S&P tersebut. Dengan itu, pertikaian utama antara perayu dan responden haruslah diputuskan memihak kepada perayu.

[10]Pembeli pihak ketiga telah mendapatkan perakuan jualan jauh sebelum responden mengeluarkan saman pemulanya, dan dalam keadaan yang sedemikian, tidak akan terdapat mana-mana Mahkamah yang akan memberikan pelaksanaan spesifik bagi perjanjian S&P antara responden dan penggadai tersebut. Telah menjadi ketetapan undang-undang bahawa perhubungan pemegang amanah/benefisiari tidak akan terpakai dalam situasi penjual/pembeli di mana kontrak penjualan dan pembelian bukan merupakan suatu kontrak di mana Mahkamah akan memberikan pelaksanaan spesifik.

Per curiam:

[1] Sungguhpun atas tanggapan bahawa gadaian perayu telah diwujudkan dan didaftarkan selepas penyempurnaan perjanjian S&P tersebut, iaitu selepas pembayaran penuh harga belian dan penyampaian pindahmilik yang telah disempurnakan, yang sah dan boleh didaftarkan, ianya masih jelas salah untuk memutuskan pertikaian utama tersebut memihak kepada responden. Ini adalah kerana s. 88 Ordinan tersebut menzahirkan konsep asas Torrens bahawa hakmilik kepada atau kepentingan dalam tanah akan terletakhak atau terlucuthak hanya setelah pendaftaran.

[2] Proposisi undang-undang berikut terpakai di Sabah sehubungan dengan gadaian tanah yang didaftarkan di bawah Ordinan tersebut: doktrin notis konstruktif adalah tidak terpakai kepada sistem-sistem pendaftaran berhubung dengan transaksi-transaksi di mana keutamaan dan notis dikawal oleh keutamaan di dalam atau fakta pendaftaran, dan Mahkamah tidak akan bersedia untuk memakai doktrin tersebut di mana kesannya adalah untuk mengesahkan suatu transaksi berhubung dengan penjualan tanah tersebut.

[3] Seksyen 12 Enakmen Perumahan (Kawalan dan Pelesenan) 1978 memperuntukkan bahawa setiap kontrak jualan akan mengandungi suatu peruntukan yang mengikat pemaju agar sebaik sahaja selepas sesuatu kontrak jualan telah ditandatangani, pemaju tidak akan menjadikan tanah yang telah dijual kepada pembeli tersebut tertakluk kepada apa-apa bebanan tanpa kelulusan terdahulu pembeli tersebut. Dalam rayuan semasa ini, s. 12 Enakmen tersebut akan menjadi relevan oleh kerana perjanjian S&P telah

disempurnakan sebelum gadaian tersebut diwujudkan. Walaubagaimanapun, perjanjian S&P tersebut tidak memasukkan peruntukan mandatori s. 12 Enakmen tersebut.

[4] Di sisi undang-undang, tidak terdapat kehendak bahawa sebelum pengujudan sesuatu gadaian ke atas tanah yang dicadangkan untuk pembangunan dan pecahan-bahagi kepada lot-lot, pemegang gadaian berkewajipan untuk menentukan bahawa lot-lot tersebut masih belum dijual atau bahawa tanah itu adalah tidak tertakluk kepada perjanjian-perjanjian jualbeli yang telah disempurnakan oleh penggadai sebagai penjual. Peninggalan yang sedemikian tidak akan membentuk satu fraud di bawah s. 340(2)(a) Kanun Tanah Negara 1965.

[Rayuan dibenarkan].

Cases referred to:

Chua Hee Hung & Ors. v. QBE Supreme Insurance Bhd. [1990] 1 CLJ 669; [1990] 1 MLJ 480 ***(not foll)***

Lin Nyuk Chan v. Wong Sz Tsin [1964] MLJ 200 ***(foll)***

Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors. [1983] 1 CLJ 183; [1983] 1 MLJ 81 ***(refd)***

Buxton & Anor. v. Supreme Finance (M) Bhd. [1992] 2 MLJ 481 ***(refd)***

M & J Frozen Sdn. Bhd. & Anor. v. Siland Sdn. Bhd. & Anor. [1994] 2 CLJ 14; [1994] 1 MLJ 294 ***(refd)***

Perwira Habib Bank (M) Bhd. v. Bank Bumiputra (M) Bhd. [1988] 3 MLJ 54 ***(refd)***

Ahmad bin Salleh & Ors. v. Rawang Hills Resort Sdn. Bhd. [1995] 3 MLJ 211 ***(orrd)***

Lysaght v. Edwards [1875-76] 2 Ch D 499 ***(dist)***

Chin Choy & Ors. v. The Collector of Land Revenue [1981] 2 MLJ 47 ***(cit)***

Ong Chat Pang & Anor. v. Valliappa Chettiar [1971] 1 MLJ 224 ***(foll)***

Rayner v. Preston [1881] 18 Ch. D. 1 ***(refd)***

Inter-Continental Mining Co. Sdn. Bhd. v. Societe des Etains de Bayas Tudjuh [1974] 1 MLJ 145 ***(refd)***

Hon Ho Wah & Anor. v. United Malayan Banking Corp. Bhd. [1994] 2 CLJ 587; [1994] 2 MLJ 393 ***(refd)***

J. Raju v. Kwong Yik Bank Bhd. [1994] 2 CLJ 695; [1994] 2 MLJ 408 ***(refd)***

Yeong Ah Chee v. Lee Chong Hai [1994] 2 MLJ 614 ***(refd)***

Peninsular Land Development v. Ahmad [1970] 1 MLJ 149 FC ***(refd)***

Temenggong Securities Ltd. & Anor. v. Registrar of Titles, Johore & Ors. [1974] 2 MLJ 45 ***(refd)***

Karuppiah Chettiar v. Subramaniam [1971] 1 MLJ 116 FC ***(cit)***

Chang & Anor. v. Registrar of Titles [1975] 8 ALJR 285 ***(cit)***

Howard v. Miller [1915] AC 318 ***(foll)***

Macon Engineers Sdn. Bhd. v. Goh Hooi Yin [1976] 2 MLJ 53 ***(refd)***

Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 85 ***(cit)***

Keng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. [1989] 1 MLJ 457 ***(refd)***

Lai Soon Cheong v. Kien Loong Housing Development Sdn. Bhd. [1993] 2 CLJ 199 ***(refd)***

Legislation referred to:
Civil Law Act 1956 (Revised 1972), s. 6
Housing (Control and Licensing of Developers) Enactment 1978, Sabah, s. 12
National Land Code 1965, ss. 92(1), 340(2), (3)
Sabah Land Ordinance (Cap 68), s. 6, 88
Sarawak Land Code (Cap 81), s. 131

Other sources referred to:
Sale and Purchase of Real Property in Malaysia, pp. 214, 218, 219
National Land Code, J. Sihombing, 2nd Edn., p. 801

For the appellant - Nobert Yapp; M/s. Jayasuriya Kah & Co., Sabah
For the respondent - Lim Pitt Kong; M/s. P.K. Lim & Co., Sabah

JUDGMENT

Edgar Joseph Jr. FCJ:

This was an appeal from the judgment of the High Court at Kota Kinabalu, Sabah arising from a priority dispute concerning certain immovable properties. The contest was between a chargee under a charge registered in the form prescribed under s. 104 of the Sabah Land Ordinance Cap 69, (the Land Ordinance) and a purchaser under an agreement of sale and purchase in writting of a single unit, being a proposed 2-storey light industrial building to be built on one of the four pieces of land the subject matter of the charge.

The essential facts which led up to the litigation the subject of this appeal may be shortly stated.

On or about 1 March 1982, United Lands Development Sdn. Bhd. (the Developer Chargor) had applied to Borneo Housing Mortgage Finance Berhad (the Finance Company Chargee) for a bridging loan of RM15,000,000 to finance the development of its proposed industrial development project on certain lands situated in the State of Sabah, comprised in Country Leases Nos. 015271360, 015271388, 015087117 and 015271388 (the Project Lands).

By a sale and purchase agreement in writing dated 2 November 1982, entered into by Time Engineering Berhad (the purchaser under the agreement) and the developer chargor, the former had agreed to buy from the latter, a single unit, being a proposed industrial building to be built on the Project Lands identified as Lot No. 6 Block A Kolombong Industrial Development, to wit, a 2 storey light industrial building to be erected on one of the Project Lands, later comprised in Country Lease No. 015454967 ("the disputed property") for a consideration of RM295,000.

Upon execution of the sale and purchase agreement, that is to say, on 2 November 1982, the purchaser under the agreement had paid a sum of RM29,500 to the developer chargor, by way of a 10% deposit to account of the purchase price aforesaid, having previously paid a booking fee equivalent to 5% of the purchase price.

On 28 May 1983, the developer chargor had created a charge over the Project Lands duly registered under s. 104 of the Land Ordinance, on 21 June, 1983 ("the charge") in favour of the Finance Company chargee to secure the repayment of the bridging loan of RM15,000,000 aforesaid.

By 23 May 1986, the purchaser under the agreement had made due payment of the entire purchase price so that completion had been effected on that date.

Unfortunately for the purchaser under the agreement, the developer chargor had committed default in repayment of the bridging loan, and thereby committed a breach of the provisions of the charge, which led to the Finance Company Chargee commencing proceedings under the Land Ordinance to enforce the charge, and which in turn led to the Assistant Collector of Land Revenue, Kota Kinabalu, making an order for sale on 17 August 1991, pursuant to which the disputed property was sold to Karamusing Jaya Sdn. Bhd. ("the purchaser at the judicial sale") at a price of RM180,000 at a public auction sale held on 30 November 1991, in consequence of which, a certificate of sale dated 26 February 1992, was duly issued.

Then on 7 December 1991, the purchaser under the agreement as plaintiff had commenced proceedings by way of originating summons citing the developer chargor, the Finance Company chargee, the Assistant Collector of Land Revenue, Kota Kinabalu and the purchaser at the judicial sale, as the first, second, third and fourth defendants, respectively, praying for the following reliefs:

1. A declaration that as between the plaintiff and the 1st defendant, the 1st defendant is a bare a trustee for the plaintiff in connection with the sale of Lot No. 6, Block A Kolombong Industrial Development together with a 2 storey light industrial building erected thereon or otherwise now known as Country Lease No. 015454967 (hereinafter referred to as "the said property") by virtue of a written agreement dated the 2nd day of November 1982 with effect from the 2nd day of November 1982;

2. A declaration that as between the plaintiff and the 2nd defendant the 2nd defendant's charge over four (4) pieces of land comprised in Country Lease Nos. 015087117, 015023515, 015271360 and 015271388 dated the 21st day of June 1983 and registered with the Lands and Surveys Department Kota Kinabalu, under Memorial No. 10196094 before the subdivision of the said lands of which the said property (CL No. 015454967) forms one of the subdivided titles after the sale of the said property to the plaintiff by the 1st defendant to the extent of the said property only is null and void or invalid on the ground that the 1st defendant no longer has any chargeable interest or otherwise in or over the said property (then undivided) to create a valid charge over the same in favour of the 2nd defendant so that any foreclosure actions taken by the 2nd defendant over the said property is wrongful as being devoid of any basis.

3. Alternatively, a declaration that as between the plaintiff and the 2nd defendant, the 2nd defendant's charge aforesaid is subject to the plaintiff's prior equitable interest over the said property acquired by the plaintiff by way of purchase of the said property from the 1st defendant prior to the execution and registration of the 2nd defendant's charge.

4. A declaration that as between the plaintiff and the 2nd defendant any foreclosure action resulting in a sale or otherwise taken by the 2nd defendant over the said property is subject to the plaintiff's prior equitable interest over the said property by payment to the plaintiff of the sum of M$295,000 being the purchase price which the plaintiff paid to the 1st defendant.

xxxx xxxx
xxxx xxxx

7. Costs of this application.

On 25 April 1994, the Judge pronounced judgment in favour of the purchaser under the agreement by making orders in terms of all the reliefs prayed for in the originating summons. From that judgment the Finance Company chargee had appealed to this Court citing the purchaser under the agreement as the sole respondent to the appeal.

We now turn to the grounds of judgment of the Court below.

In giving his reasons for decision, the Judge had merely echoed the contentions of Counsel for the purchaser under the agreement.

The Judge began by identifying the three issues which arose for decision before him - and which had been agreed by Counsel on both sides - in the following terms:

> ... Thus the primary issue between plaintiffs *vis-a-vis* second defendants is in respect of the Lot No. 6, Blok A and the three issues agreed between both parties is as recited in paragraph 3 of Counsel for second defendant's written submission, which is:
>
> (i) Whether the plaintiff has acquired any beneficial or equitable interest in the said property by virtue of the sale and purchase agreement dated 2nd November 1982 and if so, at what point in time?
>
> (ii) Whether the 1st defendant was the trustee of the plaintiff at the time when the charge was created?
>
> (iii) As between the plaintiff's equitable interest and the 2nd defendant's registered charge, who has priority?

Next, in giving his reasons for decision, the Judge began by saying this:

With respect as in paragraph B 1 of plaintiffs Counsel's written submission dated 9 April 1994:

H.S. Ong. FJ said in *Temenggong Securities Ltd. & Anor. v. Registrar of Titles & Ors.* [1974] 2 MLJ 45 at paragraph E, left hand column has this to say:

> the law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants (the purchasers) are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.

Sinnadurai in his book entitled *"Sale and Purchase of Real Property in Malaysia"* under the heading "Conclusion: Position of Parties under Malaysian Law" at page 28-30 has this to say:

> Therefore even if the vendor fails to surrender the issue document of title and the duly completed transfer documents, with the understanding that these documents will be surrendered at a later date, the vendor still becomes a bare trustee. In such a case the vendor having divested his interest in the land, specific performance is available to the purchaser. It is also further submitted that on the date for completion, if the vendor becomes a bare trustee, it operates retrospectively by conversion to the date when the contract was made.

In other words only if a bare trusteeship can be established will the purchaser acquire retrospectively, all the benefits of the vendor's trusteeship. Otherwise, the purchaser's interests are only in contract.

The Judge went to say:

> In the present case before me first defendants have received the full purchase price from plaintiffs on 23 May 1986. Thus upon the doctrine if I may call it 'when a bare trustee operates retrospectively', upon receipt of the full purchase price, first defendants became a bare trustee - for plaintiffs which operates retrospectively by conversion to the date when the contract was made. i.e. 2 November 1982.

And, this is what the Judge next said:

> And with respect as in paragraph 2 of plaintiffs' Counsel's written submission dated 9 April 1994:
>
> 2. In applying the above quoted principles and the views of the learned author to the present case on the position in Malaysian law, it is respectfully submitted that:
>
> 2.1 the plaintiff acquires a beneficial or equitable interest in the said property from the time the agreement for the sale and purchase of the said property between the plaintiff and the 1st defendant was signed on 2 November 1982. The 1st defendant at this point in time is a 'qualified trustee' for the plaintiff that is until the purchase price is paid in full;
>
> 2.2 When the plaintiff pays the balance of the purchase price in full on 23 May 1986, the 1st defendant on this date thereupon becomes a 'bare

trustee' for the plaintiff, and such full trusteeship operates retrospectively by conversion to the date when the contract was made;

2.3 So because of the retrospective effect of the trusteeship, the 1st defendant effectively became the bare trustee of the plaintiff on 21.11.1982 when the contract was made; and

2.4 the 1st defendant, notwithstanding its failure to surrender the issue document of title and the duly completed transfer documents to the plaintiff, it is even more so by reference to exhibit TBS-3 annexed to the plaintiff's affidavit which clearly evinces the understanding that these documents will be forwarded to the plaintiff.

And, the Judge continued:

> And with respect I also agree with paragraph 3 of plaintiffs' Counsel's written submission dated 9 April 1994:
>
> 3. It is submitted that since the 1st defendant's Memorandum of Charge over the project land (which included the said property sold to the plaintiff) in favour of the 2nd defendant was executed on 28.05.1983 after the contract between the plaintiff and 1st defendant dated 02.11.1982, the 1st defendant by operation of the retrospective trust on completion of the sale by payment of the full purchase price on 23.05.1986 is already a bare trustee of the plaintiff as at 02.11.1982 prior to the creation of the charge. Consequently, the plaintiff is entitled to its claim for the declaration sought under Prayer (1) of the Originating Summons ...

And, this is what the Judge finally said:

> And with respect I think with plaintiffs succeeding as in Prayer 1, the other Prayers 2, 3, 4 and 7 are merely consequential.

Before us, the primary submission advanced by Counsel for the Finance Company Chargee was that the Judge had erred in holding, as he did in fact hold, that upon receipt of the full purchase price, the developer chargor had become a bare trustee for the purchaser under the agreement and that the trusteeship "operates retrospectively by conversion to the date when the contract was made", that is to say in the present case, 2 November 1982, applying the view of Professor Visu Sinndurai (now Mr. Justice Visu Sinndurai) in his textbook *"Sale and Purchase of Real Property in Malaysia"* at pp. 218, 219.

The preliminary point we should like to deal with is:

Whether the system of land tenure in Sabah is based upon the Torrens registration system?

Nowhere in the Land Ordinance is there any provision conferring indefeasibility of title to or interests in land which is a feature of central importance to the Torrens system of land registration. This is to be contrasted with the position

in Peninsular Malaysia and Sarawak, where there are express provisions conferring such indefeasibility. (See s. 92(1) and s. 340 of the National Land Code, 1965, and s. 131 Sarawak Land Code (Cap 81), respectively.) Moreover, in Sabah unlike Peninsular Malaysia and Sarawak, in appropriate circumstances, the doctrine of adverse possession, may be invoked against private owners of land. (See s. 6 of the Sabah Land Ordinance (Cap 68) which merely bars any claim to any right, title or interest in State land only based on adverse possession thereof).

Nevertheless, in *Chua Hee Hung & Ors. v. QBE Supreme Insurance Bhd.* [1990] 1 MLJ 480, the Supreme Court, speaking through Lee Hun Hoe CJ, said (at p. 484 col. 1 F), though without discussion:

> In our view, since the Sabah Land Ordinance and the National Land Code are modelled on the Torrens System, the vendor/trustee relationship applicable in Peninsular Malaysia should be equally applicable in Sabah ...

Similarly, in the earlier case of *Lin Nyuk Chan v. Wong Sz Tsin* [1964] MLJ 200, the old Federal Court, which comprised Thomson LP, Wee Chong Jin CJ (Singapore) and Wylie CJ (Borneo), at a time when our Apex Court was still the Privy Council, expressed the view that the Land Ordinance provides for a **modified** Torrens system of land registration. This is how Wylie CJ (Borneo) speaking for the Court put it:

Section 88 of the Land Ordinance reads as follows:

> "No new title and no dealing with, claim to or interest in any land except, land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part".

> Part V of the Land Ordinance provides for a modified Torrens system of land registration in Sabah and this section corresponds to the provision necessary in this system to ensure that no title to interests in land shall pass until the dealing has been registered. The language employed is somewhat different from that used in the majority of systems in use in the Commonwealth. The usual provision is to the effect that no instrument shall be effectual to pass any interest in land without registration and that, upon registration, the interest shall pass. See section 27 of the Land Titles Ordinance, 1956 of Singapore for an illustration, and also the reference to the number of jurisdictions in which this provision exists set out in page 116 of Hogg's Registration of Title to Land Throughout the Empire. In nearly all jurisdictions, however, notwithstanding variations in the language used, it has been held that these provisions do not render unenforceable contracts or agreements which would lead up to the execution and registration of instruments. Even the unregistered instrument itself may give a title in equity and an equitable right to enforce the agreement which must have existed between the parties when the instrument was executed. See *Abigail v. Lapin.* [1934] AC 491. Section 4 of the Selangor Registration of Titles Regulation 1891, employed what is probably the most sweeping language used in these provisions. That section provided that land comprised in a grant shall not be capable of being

dealt with except in accordance with the statutory provisions and that 'any attempt' to deal with land except in this manner 'shall be null and void and of no effect'. Nevertheless, in *Haji Abdul Rahman v. Mohamed Hassan*, [1917] AC 209. 1 FMSLR 290, the Judicial Committee of the Privy Council held that an agreement, not in registrable form, to transfer back certain land upon a certain contingency happening, while 'valueless as a transfer or burdening instrument,' (p. 215) was good as a contract. It was said that it was not an 'attempt to transfer, but a conditional promise to transfer.' (p. 214).

The language of s. 88 is not nearly as sweeping as that of the Selangor provision. Moreover, its effect is confined to a new title or a dealing with claim to, or interest in land. Following the foregoing authorities, and others too numerous to mention, in my judgment s. 88 does not affect contracts or agreements otherwise valid and enforceable. As was pointed out in *Abigail's* case (p. 500), the provision for protection of unregistered interests by caveats shows that the legislation does not attempt to render all unregistered interests non-existent. What it does, is to prohibit the acquisition of a legal estate or interest in land except by registration of an instrument in the statutory form. Section 116 of the Land Ordinance of Sabah makes the usual provision for caveats which may be registered by any person claiming to be entitled to any interest in any land. Obviously, such a provision is inconsistent with any interpretation of s. 88 which involves holding that any agreements or other documents affecting land are of no effect and that only registration of the dealing in the land is to have legal validity at all.

For these reasons. I hold that s. 88, notwithstanding the variation in language from that used in most jurisdictions, does not render this agreement for a lease invalid or unenforceable.

Indeed, other considerations apart, the provisions of s. 88 make it imperative in my view that there should be an order for specific performance, including an order that the respondent execute a registrable memorandum of sublease embodying the terms of the agreement and do all other acts necessary to enable registration to be effected. For, in this agreement, she has agreed to let these premises for fifteen years and, having regard to the provision of s. 88, the only manner in which the law of Sabah permits her to vest in the appellant the interest she has thus agreed to grant to him, is by doing those acts necessary to register the dealing.

With respect, we are unable to agree with Lee Hun Hoe CJ (Borneo) when he said in *Chua Hee Hung* that the Land Ordinance, like the National Land Code, is **modelled** on the Torrens System.

We say so because, unlike the National Land Code, there is no provision in the Land Ordinance conferring indefeasibility of title or interests in land on registration which is a feature of central importance to the Torrens system of land registration.

However, s. 88 which emphasises the paramount importance of registration in accordance with Part V of the Land Ordinance as a condition precedent for the recognition of the validity of title or dealing or claim to or interest in any

land (except land still held under native customary tenure without documentary title) does, in our view, imply the basic Torrens concept that title to or interest in land vests and divests only upon registration. Moreover, the provisions of s. 116 of the Land Ordinance regarding the role of the caveat in giving notice of claim against the registered title, points to the same conclusion. We therefore agree with the view of the old Federal Court, speaking through Wylie CJ (Borneo) in Lin Nyuk Chan, that the Sabah Land Ordinance (Cap 68) provides for a **modified** Torrens system of land registration.

It follows, therefore, that the Peninsular Malaysian cases such as *Tai Lee Finance Co. Sdn Bhd v. Official Assignee & Ors.* [1983] 1 MLJ 81, *Buxton & Anor. v. Supreme Finance (M) Bhd.* [1992] 2 MLJ 481 and *M & J Frozen Sdn Bhd & Anor. v. Siland Sdn. Bhd. & Anor.* [1994] 1 MLJ 294: *Perwira Habib Bank (M) Bhd. v. Bank Bumiputra (M) Bhd.* [1988] 3 MLJ 54, with their emphasis on the indefeasibility of the chargee's registered title, guaranteed by s. 340 of the National Land Code subject only to the exceptions of fraud or misrepresentation, or where registration has been obtained by forgery or by means of an insufficient or void instrument or where title or interest has been unlawfully acquired, were of no **direct** relevance to the issues which arose for decision in the present appeal though, of course, the Finance Company chargee could derive analogical support therefrom.

In our view, the correct approach to adopt in considering the priority dispute in this appeal is to apply general law priority rules not forgetting s. 88 of the Land Ordinance and the concept of the bare trust doctrine in a vendor/purchaser situation.

In the course of the submission by Counsel for the purchaser under the agreement our attention was directed to the judgment of the High Court at Shah Alam, in *Ahmad bin Salleh & Ors. v. Rawang Hills Resort Sdn. Bhd.* [1995] 3 MLJ 211 wherein it was held (at p. 218):

> ... It is clear that after a sale and purchase agreement for the sale of land is **concluded,** the purchaser under our Malaysian law derives a beneficial ownership to the said land.

In so holding, the Court had relied on the familiar dicta of Jessel MR in *Lysaght v. Edwards* (1875-76) 2 Ch. D 499, 506, namely:

> It appears to me that the effect of a contract for sale has been settled for more than two centuries; ... it is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession.

It must not be overlooked that *Lysaght v. Edwards* was concerned with an issue arising under a will as a result of a query by the personal representative of a deceased vendor in a case where a conveyance had not yet been executed, there being no dispute between vendor and purchaser.

In our view, to apply the dicta of Jessel MR in **unqualified terms** in Peninsular Malaysia and in Sarawak where the Torrens system of registration of title applies or in Sabah where the Land Ordinance provides for a modified Torrens system of land registration, would be misplaced. Indeed, in *Chin Choy & Ors. v. The Collector of Land Revenue* [1981] 2 MLJ 47, the Privy Council speaking through Lord Roskill, though by way of *obiter dicta* only, expressed reservations on the bare trust concept under the Malaysian Torrens system especially in view of s. 6 of the Civil Law Act (Revised - 1972), which provides:

> 6. Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

This is how Lord Roskill put it:

> ... Much emphasis was laid by learned Counsel for the appellant in his argument upon the existence in Malaysia of the Torrens system and upon the differences between that system and conveyancing practice in England. Nonetheless learned Counsel also contended that the effect of the agreement of 30 October 1971 was to transfer the equitable title of the property to the appellant notwithstanding that the legal title could only be transferred by registration in accordance with the National Land Code. The respondent was prepared to concede that the equitable title was transferred on that date and in that manner. However, the principle that once a valid contract for sale is concluded the vendor becomes in equity a trustee for the purchaser of the estate sold is a peculiarity of English land law. But s. 6 of the Civil Law Ordinance 1956 of the Federation of Malaya expressly provides that nothing in that part of that statute should be taken to introduce into the Federation 'any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate right or interest therein'. It is not however, necessary for their Lordships further to pronounce upon this question in the present appeal ...

Referring to the dicta of Jessel MR aforesaid, in the context of the question whether reliance thereon would be appropriate in Malaysia, Professor Visu Sinnadurai has said this in his book *Sale and Purchase of Real Property* (at p. 214):

> One important point to note is that reliance on the dicta of Jessel MR in *Lysaght v. Edwards* may not be wholly suitable in countries where the Torrens system of registration is applicable. Much emphasis was placed on the evidence of the vendor's good title by Jessel MR. The problem of the vendor's title is not as acute under the Torrens svstem as under English law.

We note that in *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] 1 MLJ 224 FC Gill FJ refused to follow the dicta of Jessel MR and expressed a preference for the dissenting judgment of James LJ in *Ravner v. Preston* [1881] 18 Ch. D. 1, though he took an opposite view in the later case of *Inter-Continental Mining Co. Sdn. Bhd. v. Societe des Etains de Bayas Tudjuh* [1974] 1 MLJ 145.

But, having said that, it is right to say at the risk of being trite, that there has been a consistent current of recent decisions by the Supreme Court applying the concept of the bare trust in a vendor and purchaser situation though without discussion as to its appropriateness under the Malaysian Torrens system. (See *M & J Frozen Food & Anor. v. Siland Sdn. Bhd.* [1994] 1 MLJ 294; Hon *Ho Wah & Anor v. United Malayan Banking Corp. Bhd.* [1994] 2 MLJ 393; *J. Raju v. Kwong Yik Bank Bhd.* [1994] 2 MLJ 408, *Yeong Ah Chee v. Lee Chong Hai* [1994] 2 MLJ 614; *Chua Chee Hung & Ors. v. QBE Supreme Insurance Bhd.* [1990] 1 MLJ 480). And, in *Yeong Ah Chee v. Lee Chong Hai*, the Court went so far as to suggest that the concept of the bare trust in a vendor and purchaser situation applied under the Malaysian Torrens system by virtue of the Civil Law Act 1956.

In our view therefore, it is too late now to question the applicability of the concept of the bare trust in a vendor/purchaser situation in Malaysia, though there is high authority to show that the concept as enunciated by Jessel MR in *Lysaght v. Edwards*, would require to be applied in a modified form, so far as the question **when** the bare trust will arise is concerned, and it is to this question that we must now direct attention.

The question: when the vendor of land becomes a bare trustee for the purchaser in Malaysia, has **not** been uniformly answered by the old Federal Court, in the days when our Apex Court was the Judicial Committee of the Privy Council and this is reflected in a number of its decisions, to some of which we should now like to refer.

In *Peninsular Land Development v. Ahmad* [1970] 1 MLJ 149 FC, Suffian FJ (as he then was) said (at p. 151):

> In my judgment the company (the vendor) becomes in equity a trustee for the plaintiff (the purchaser) and the beneficial ownership passes to the plaintiff as soon as the purchase price has been paid.

In *Temenggong Securities Ltd. & Anor. v. Registrar of Titles, Johore & Ors.* [1974] 2 MLJ 45, FC H S Ong FJ said (at p. 47):

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants (the purchasers) are bare trustee for the appellants of the said land.

This view was not dissented from by the Privy Council when their Lordships dealt with the matter on appeal. (See [1976] 2 MLJ 44).

But, in the earlier case of *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] 1 MLJ 224 FC Gill FJ took a somewhat different view, when he said (at p. 229):

> ... the point at which the vendor becomes constructively a trustee for the purchaser is reached only when he has done **all** that is necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the purchasers. (Emphasis provided)

J. Sihombing in her book *National Land Code A commentary* (2nd Edn.) at p. 801 says that the proprietor has done all that is necessary when he has given the donee a transfer in registrable form and the issue document of title.

In *Karuppiah Chettiar v. Subramaniam* [1971] 1 MLJ 116, FC, it was held (at p. 119) that a vendor is regarded as having divested himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full.

In our view, the contractual events, which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the purchaser, is on **completion**, that is to say, upon receipt by the vendor of the full purchase price, timeously paid **and** when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

In our view, it is not a correct description of the relationship between the parties to a contract of sale and purchase of land, to say, as did the High Court, Shah Alam in *Ahmad bin Salleh*, that from the time a contract of sale and purchase of land is **concluded,** the vendor is a trustee for the purchaser. At that stage, they are only parties to a contract of sale and purchase of which a Court may, in certain circumstances, decree specific performance.

We cannot, however, give unqualified approval to the view of Professor Visu Sinnadurai, found at page 219 of his well regarded book on *Sale and Purchase of Real Property, in Malaysia* - which, it will be recalled, was the "sheet anchor" of the judgment of the Court below - that "... on the date of completion, if the vendor becomes a bare trustee, it operates retrospectively by conversion to the date when the contract was made," as this proposition, if applied **universally**, could cause considerable difficulties in the workings of the Torrens system of registration of title or even a modified Torrens system of land registration, as in Sabah, contained in a codifying enactment. Take this very case, where between the execution of the Sale and Purchase Agreement

and completion, the interest of the Finance Company chargee had intervened in the circumstances mentioned, so that, to transfer into the law of vendor and purchaser, the law governing the rights and duties of trustees, statutory or otherwise, would give rise to considerable difficulties. (per Jacobs J. in *Chang & Anor. v. Registrar of Titles* [1975] 8 ALJR 285, 295.)

A further factor which complicates the matter here is the position of the purchaser at the judicial sale in whose favour a certificate of sale, dated 26 February 1992, had been issued **prior** to the pronouncement of the judgment on 25 April 1994, in the proceedings by way of originating summons by the purchaser under the agreement, which had been overlooked all round and to which we shall have to revert.

Given these circumstances, no Court would grant specific performance of the agreement of sale and purchase aforesaid. The trustee beneficiary relationship will not be applied in a vendor and purchaser situation where the contract of sale and purchase is not one of which a Court would grant specific performance. As the Privy Council said on appeal from Canada in *Howard v. Miller* [1915] AC 318:

> It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase-money, but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract. (per Lord Parker of Waddington, at page 326).

In the present context, the following passage in J. Sihombing's book on the National Land Code (1st Edn.) at p. 570 merits reading:

> If the holder of the unregistered interest can act as if he does hold an interest in land then there is little difference between the general law system and that of Torrens. The immediate result would be uncertainty. It would no longer be possible to rely on a conclusive register and a person intending to deal with land must go behind the register and investigate all transactions entered into by the registered owner. This is the very uncertainty for which the Torrens system was designed to avoid.

To return to *Ahmad bin Salleh & Ors. v. Rawang Hills Resort Sdn. Bhd. (supra)*, if we may say so, with respect, the High Court, Shah Alam's understanding of the *Peninsular Land Development* case and the Supreme Court case of *M & J Frozen Food Sdn. Bhd. & Anors. v. Siland Sdn. Bhd.* [1994] 1 MLJ 294 and *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53, (all of which were biding upon that Court) was mistaken and clearly wrong.

In particular, having regard to our views as to **when** a vendor of land becomes a bare trustee for the purchaser in Malaysia, we would take this opportunity, of overruling the proposition of law laid down by the High Court, Shah Alam,

in *Ahmad bin Salleh* (*ibid* at p. 218 G) that "- it is clear that after a sale and purchase for the sale of land is **concluded**, the purchaser under our Malaysian law derives a beneficial ownership to the said land." (Emphasis provided).

Similarly, we would over-rule the proposition of law laid down by the High Court, Shah Alam, in *Ahmad bin Salleh* (*ibid* at p. 221) that "In a contract of sale, the question of whether the defendants are bona fide purchasers is irrelevant where no fraud or misrepresentation exists". As this proposition of law involved the interpretation of s. 340 of the National Land Code and, in particular, the provisions of the proviso to s. 340(3), we would have thought that the 36 words in which that proviso is set out would be quoted in the judgment and their proper construction considered. Such, however, was not the case.

It follows that in the present case, the Judge in the Court below, had erred in law, when he held, as he did in fact hold, that the Finance Company chargee's charge had been created **after** the developer had become a bare trustee of the purchaser under the agreement and, that consequently, the Finance Company chargee had to take the charge subject to the equitable interest or beneficial interest in the disputed property of the purchaser under the agreement. This holding is flatly contradicted by the undisputed evidence and the applicable law, as we understand it, which showed that at the time when the Finance Company's charge was created, that is to say, on 28 May 1983, and registered on 21 June 1983, the chargor was not yet a trustee of the purchaser under the agreement. Consequently, any suggestion that the charge thus created was null and void was devoid of any legal basis.

But, even assuming that completion under the sale and purchase agreement and handing over by the developer chargor to the purchaser under the agreement of a duly executed, valid and registrable transfer of the disputed property to the purchaser under the agreement, had preceded the creation of the charge, it would still have been clearly wrong in law to decide the priority dispute in favour of the purchaser under the agreement. To reiterate, although unlike the applicable law in Peninsular Malaysia and Sarawak, in Sabah, there is no provision in the Land Ordinance conferring indefeasibility of title or interest in land on registration yet, Chapter V of the Land Ordinance, and especially s. 88, does imply the basic Torrens concept that the title to or interest in land vests and divests only on registration.

That being so, the following proposition enunciated by the Federal Court in *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85, would apply to Sabah in relation to a charge of land registered under the Land Ordinance:

> the doctrine of constructive notice is inapplicable to systems of registration in relation to transactions where priority and notice are governed by priority in or

the fact of registration and the Court will not readily apply the doctrine where the effect would be to invalidate a transaction in relation to the sale of land.

In the present case, nowhere in the affidavits was there even an allegation by the purchaser under the agreement that there had been fraud on the part of the Finance Company Chargee or collusion between it and the developer/chargor, to defeat the interest of the purchaser under the agreement. Indeed, in creating the charge over the disputed property, the developer/chargor was engaged in a transaction of a sort which is regularly encountered in the commercial world and in no way abnormal.

On a further ground also - not taken up before us - the appeal was bound to succeed. What was overlooked all round was that well **before** the judgment was pronouncement on 25 April 1994, the interest of the purchaser at the judicial sale had intervened, there having been already issued the Certificate of Sale, dated 26 February 1992, aforesaid in its favour and it being a purchaser in good faith for valuable consideration and without notice of the circumstances alleged to render the Finance Company Chargee's title defeasible.

There is a final point which is really a new point - not argued in the Court below or before us, but which we had noticed - which needs to be addressed. By s. 12 of the Housing (Control and Licensing of Developers) Enactment 1978, of Sabah, it is provided that every contract of sale shall contain a provision binding on the licensed housing developer that immediately after a contract of sale has been signed the developer shall not subject the land sold to the purchaser to any encumberance without the prior approval of the purchaser. This provision is similar to Regulation 12(l)(b) of the Housing Developers (Control and Licensing) Regulations, 1982, applicable to Peninsular Malaysia, previously Rule 12(1)(b) of the Housing Developers (Control and Licensing) Rules 1970.

In the present case, the sale and purchase agreement was executed **before** the charge was created, so s. 12 of the Housing (Control and Licensing of Developers) Enactment, 1978 of Sabah would be relevant. We note that the sale and purchase agreement did **not** include the mandatory provisions of s. 12. We are aware that in *Keng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd.* [1989] 1 MLJ 457 where the agreement of sale and purchase not only failed to include the mandatory clause provided for in r. 12(l)(b) of the Housing Developers (Control and Licensing) Rules, 1970, but in fact contained, by clause 3, a provision which flatly contradicted it and which was unlawful and of no efect, the Privy Council had expressed the view that *prima facie,* there was a strong arguable ground for contending that a provision which seeks to circumvent a mandatory clause by imposing on the purchaser a blanket approval upon the signature of the contract cannot be effective. Their Lordships went on to express the view, that there was an arguable case that a charge, in the absence of express approval by the individual

purchasers, would have been created by the chargor - who was an unlicensed developer - without the authority of the purchasers of whose interests the chargee had express notice, might be tainted with illegality, thus rendering the charge unenforceable.

In the present case, however, it would be wrong to assume, that had the purchaser under the agreement advanced a submission based on s. 12 of the Housing (Control and Licensing of Developers) Enactment of Sabah, in the Court below, it was bound to have succeeded. Certainly, had it done so, most probably the evidence would not have been the same. For instance, evidence might have been led in the Court below to show that, at the material time, the Finance Company Chargee was **not** aware that the Project Lands or any part thereof were the subject of sale and purchase agreements or, if it was aware, evidence might have been led to show that the purchasers had given their prior approval to the creation of the charge. Similarly, assuming there had been any allegation by the purchaser under the agreement of fraud or collusion on the part of the Finance Company Chargee and the developer/ chargor, evidence might have been led to rebut the same.

We should add, that in law, there is no requirement that prior to the creation of a charge over land which is intended for development and sub-divided into lots for sale to the public, a chargee is under an obligation to ascertain that the lots have not been sold or that they are not the subject of sale and purchase agreements executed by a chargor as vendor. It goes without saying that it behoves a chargee to do so but, - we hasten to add - such an omission, even though it might constitute negligence would not constitute fraud within s. 340(2)(a) of the Code. (See *Lai Soon Cheong v. Men Loong, Housing Development Sdn. Bhd.* [1993] 2 CLJ 199).

In all the circumstances, we felt bound to hold that the interest of the Finance Company chargee must prevail. (See *Buxton & Anor. v. Supreme Finance (M) Bhd.* [1992] 2 MLJ 481).

In the result we had no hesitation in unanimously allowing the appeal with costs here and below, setting aside the judgment of the Court below and answering the question of priority which arose for decision, in favour of the Finance Company Chargee. The orders made by the Assistant Collector of Revenue, Kota Kinabalu, were accordingly restored and the sale to the purchaser at the judicial sale affirmed. The deposit paid into Court by way of security for costs was ordered to be refunded.

Reported by Gan Peng Chiang